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Nos. 80-847 and 80-1067

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMON CAUSE, *et al.*,
Appellants,

v.

HARRISON SCHMITT, *et al.*,
Appellees.

FEDERAL ELECTION COMMISSION,
Appellant,

v.

AMERICANS FOR CHANGE, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

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February 6, 1981

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Appellees.

On Appeal from the United States District Court for the District of Columbia

OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM [1]

According to appellees, it is perfectly appropriate—indeed, desirable—for this Court to invalidate an Act of Congress without a factual record to illuminate either the actual working of the statute or the important gov-

[1] Common Cause, David Cohen and Winifred Long, appellants in No. 80-847, are filing this Opposition in both of the above-captioned cases because both cases involve the same constitutional issue, arise out of the same proceeding, and have been briefed together by appellees.

Citations to our Jurisdictional Statement are given by "J.S. ——." Citations to the Appendices to our Jurisdictional State-

ernmental interests it serves, and without full briefing and argument to explore the constitutional issues at stake. Appellees are wrong.

The invalidation of 26 U.S.C. § 9012(f) would have serious consequences, for—as the Federal Election Commission ("the Commission") has emphasized—it would substantially undermine the public-financing scheme enacted by Congress in the Fund Act.[2] *See* FEC J.S. 13-15; *see also* J.S. 16-19. These cases therefore require careful, fully informed consideration. Consistently with its long-standing practice, the Court should reverse (or vacate) the decision below and remand the cases to the district court so that an adequate record can be developed. In any event, the Court should not decide the constitutional issues in the absence of full briefing and argument. As for AFC's jurisdictional and standing arguments—on which the court below did not rule—the Court should either reject them now or let the district court consider them first on remand.

I. APPELLEES HAVE GIVEN NO COGENT REASON WHY THIS COURT SHOULD DEPART FROM ITS LONG-STANDING PRACTICE OF REQUIRING THE DEVELOPMENT OF AN ADEQUATE FACTUAL RECORD AS A PREDICATE FOR CONSTITUTIONAL ADJUDICATION.

A fully developed factual record is a basic prerequisite for the delicate task of constitutional adjudication. This Court has consistently reversed district court decisions and remanded for factual development when the record did not provide "the concrete factual setting . . .

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ment are given by "App. ——." Finally, citations to the Jurisdictional Statement filed by the Federal Election Commission are given by "FEC J.S. ——."

[2] Presidential Election Campaign Fund Act, 26 U.S.C. ch. 95.

especially demanded for constitutional decision." *United States* v. *Automobile Workers*, 352 U.S. 567, 591 (1957).[3]

Appellees do not deny the importance of this principle; they do not deny that the record in this case is extraordinarily sparse; and they do not claim that the relatively limited discovery needed to compile a factual record would in any way prove burdensome. Instead, appellees contend that a factual record is simply unnecessary in this case: They pretend that this Court would need a factual record only in order to determine whether they are covered by Section 9012(f), concede that the statute applies to them, and then insist that the Court has all the information it needs to strike down the statute.

Appellees' argument is fundamentally flawed. The issue before this Court is not whether Section 9012(f) applies to them—it clearly does—but whether, in light of all of the circumstances surrounding its application to committees such as appellees, Section 9012(f) is constitutional. When the constitutionality of an Act of Congress is challenged, the context in which the statute operates, the effects it has and the interests it serves must be explored and fully understood—even if it is undisputed that the challengers come within the statute. *See* note 3 *supra*. These matters must be explored in this case; they are factual in nature, and they cannot (and should not) be decided on the basis of blind hunches or argumentative assertions.

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[3] In addition to the cases cited at J.S. 13, 15 & n.18, *see, e.g.*, *Mandel* v. *Bradley*, 432 U.S. 173, 177-79 (1977) (*per curiam*) (decision vacated and remanded where a three-judge district court had held a statute unconstitutional on the basis of a previous Supreme Court decision instead of "sift[ing] through the conflicting evidence and making findings of fact" concerning the operation of the statute); *Storer* v. *Brown*, 415 U.S. 724, 738-40 (1974) (this Court stated it was "quite sure" that the decision of a three-judge district court should be vacated and remanded because in order "to assess realistically whether the law imposes excessively [and thus unconstitutionally] burdensome requirements . . . it is necessary to know other critical facts which do not appear from the evidentiary record"); *Gilmore* v. *City of Mont-*

There is another, equally fundamental reason why appellees are wrong in requesting this Court to decide the case on a virtually non-existent record. The district court's decision—which appellees say was correct and urge this Court to affirm—depended upon crucial factual findings that the record does not support, that appellants (including the Commission) contend are erroneous, and that even appellees have not seriously attempted to defend.

The district court correctly stated that "[a] 'contribution' case . . . is entitled to less-exacting judicial scrutiny [than an 'expenditure' case] because the 'transformation of contributions into political debate involves speech by someone other than the contributor.'" App. 15a (*quoting Buckley* v. *Valeo*, 424 U.S. 1, 21 (1976)) (footnote omitted). The court found, however, that no such "transformation" occurs in the case of committees such as appellees, because (in the court's view) the contributors control the committees' expenditures. On that basis—and that basis alone—the district court held that Section 9012(f) operates as an "expenditure" limitation and struck it down. App. 15a-18a. Thus, the district court's decision hinged on its finding that the contributors control how the committees spend their contributions.

To the extent the record sheds light on the relationship between committees and their contributors, it indicates—as we have already noted, and as the Commission agrees—that the district court's finding was incorrect. *See* J.S. 7 n.9; FEC J.S. 24-25. But the point here is not whether the district court's finding was or was not correct on the basis of the record before it. The point is, rather, that the record is woefully inadequate to enable any court (including this Court) to decide with any degree of

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gomery, 417 U.S. 556, 570-74 (1974) (decision reversed in part and remanded where the record before this Court did "not contain sufficient facts upon which to predicate [the requisite] legal judgments").

assurance a central issue in this case—whether the contributors in fact exercise control.[4]

Appellees do not contend that the record is adequate to serve as the basis for deciding this issue. AFC and FCM are simply mute on the subject, while AEP makes the extraordinary suggestion that the district court's findings are gratuitous and should simply be ignored. *See* AEP Br. 9-10 n.9. But findings as to control were essential to the district court's analysis, and such findings require a factual record. *Cf. Beal* v. *Doe*, 432 U.S. 438, 448 (1977) (case remanded to three judge court where the record was inadequate to permit this Court to determine who really controlled the medical decision at issue).

This Court should decline appellees' invitation to decide a delicate and important constitutional issue in the dark. A fully developed record is essential here just as it was in the previous cases in which this Court has ruled on the constitutionality of election-law provisions.[5] The Court

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[4] It is equally impossible to decide, on the present record, whether another finding crucial to the district court's constitutional analysis is in fact correct—its finding that a political committee's formal independence eliminates any danger that the candidate, if elected, will be (or appear to be) beholden to the committee. App. 19a; *see* J.S. 11, 27. This conclusion is essentially factual in nature. Evidence can and should be developed bearing on the question whether the activities of entities like appellees pose the kinds of dangers of actual or apparent *quid pro quo's* that this Court recognized in *Buckley*. *See* 424 U.S. at 26-27.

Appellee FCM has erroneously suggested that this question was answered in *Buckley*. *See* FCM Br. 8. But FCM has ignored this Court's express statement that its discussion of independent expenditures in *Buckley* was limited to election practices as they "presently appear[ed]." 424 U.S. at 46. The kinds of entities and activities at issue in this case were unknown and unforeseen when *Buckley* was decided, and they were not before this Court for consideration in *Buckley*. *See* J.S. 20-21.

[5] *Buckley* v. *Valeo*, *supra*, 424 U.S. at 9-10; *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280,

should, therefore, reverse (or vacate) the decision below and remand these cases for the development of an adequate factual record.

II. THERE IS NO MERIT TO APPELLEES' CONTENTION THAT THESE CASES DO NOT WARRANT PLENARY REVIEW.

Appellees' contention that the district court's invalidation of 26 U.S.C. § 9012(f) does not present a substantial federal question is—and we use this term advisedly—frivolous. As the Commission has correctly stated, Section 9012(f) was "rooted in Congress' wise, indeed expert, assessment of the potential danger in allowing political professionals to amass, control and spend vast sums to secure the election of presidential candidates." FEC J.S. 13. *Accord*, J.S. 16-19. In concluding that Section 9012(f) does not serve important governmental interests, the district court simply disagreed with Congress' considered determination. Under these circumstances, summary disposition of these cases would be inconsistent with the respect owed to considered determinations of the Legislative Branch in matters so peculiarly within its expertise.

Nothing in *Buckley* v. *Valeo* diminishes the need for plenary consideration in these cases. Neither Section 9012(f) nor the kinds of activities in which appellees have engaged were before this Court in *Buckley*, *see* J.S. 20-21, and appellees do not contend otherwise. Moreover, the across-the-board prohibitions against independent expenditures that the Court overturned in *Buckley* differed in every material respect from the carefully tailored limitation contained in Section 9012(f). *See*

290-307 (S.D.N.Y.) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980).

There is no merit to AEP's suggestion that this Court ignored the record in *Buckley*. *See* AEP Br. 10 n.9. This Court relied extensively upon that record. *See, e.g.* 424 U.S. at 20 nn.20-21, 21-22 n.23, 26 n.27, 32 nn.34-37, 33 n.39, 34 n.40, 37 n.42.

J.S. 24-26.[6] Thus, in arguing that *Buckley* mandates affirmance of the decision below, appellees are in reality asking this Court significantly to extend *Buckley*. *See* J.S. 25 & n.26. Such a step would require plenary consideration.[7]

Full briefing and argument will materially assist the Court in resolving important questions of statutory construction that bear directly on the constitutionality of Section 9012(f). Section 9012(f) only applies to "political committees" as that term is defined in the Fund Act. Appellants contend that the term, properly construed, excludes groups of individuals who pool and spend their own money, without relinquishing control over it, and that such groups therefore do not come within Section 9012(f). *See* J.S. 24 & n.23. *See also* FEC J.S. 19. In response, AEP asserts that this construction is "not based on statutory language, legislative history, . . . or on any other criterion utilized by lawyers." AEP Br. 20. But

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[6] In particular: (1) As appellees concede, Section 9012(f) leaves individuals free to make unlimited independent expenditures, whereas the statute overturned in *Buckley* prohibited essentially all such expenditures. (2) Section 9012(f) only applies to a narrow and specific type of group ("political committees" within the meaning of the Fund Act), whereas the statute overturned in *Buckley* applied to all groups. (3) Section 9012(f) does not (and was not intended to) place a limit on the total amount of money that can be spent to support candidates, whereas the statute overturned in *Buckley* drastically restricted the overall quantity of political speech. (4) Section 9012(f) protects the integrity of the Fund Act's public-financing scheme and therefore applies only when a candidate has accepted public funding, whereas the statute overturned in *Buckley* choked off all independent expenditures regardless of whether a candidate had received public financing.

[7] Appellees also err in contending that *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), supports affirmance. To be sure, *Bellotti* explained that the capacity of speech for informing the public does not depend upon the identity of its source. *Id.* at 777. But that capacity is not at issue here. Rather, these cases call into question Congress' power to protect against actual (or apparent) *quid pro quo*'s resulting from the creation

as AEP must be aware,[8] appellants' construction finds support in both the language of the Fund Act[9] and its legislative history.[10] It is also supported by the well-established principle—which runs directly counter to appellees' approach—that this Court's "task is not to destroy the Act if we can, but to construe it, if consistent with the

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of political debts in candidate elections. *Bellotti* did not deny Congress that power; to the contrary, it acknowledged it. *Id.* at 788 n.26.

[8] Appellants provided detailed support for their position on this point in their district court briefs filed on August 4 and 18, 1980.

[9] The statutory language shows that only a relatively narrow class of entities are "political committees" within the meaning of the Fund Act. The Fund Act defines a "political committee" to include only a "committee, association, or organization (whether or not incorporated). . . ." 26 U.S.C. § 9002(9). By contrast, the Federal Election Campaign Act ("FECA") defines a "political committee" as including "any committee, *club*, association, *or other group of persons*. . . ." 2 U.S.C. § 431(4)(A) (emphasis added). Similarly, the Presidential Primary Matching Payment Account Act defines a "political committee" as including "any *individual*, committee, association, or organization (whether or not incorporated). . . ." 26 U.S.C. § 9032(8) (emphasis added). The Fund Act thus defines "political committee" more narrowly than do these other statutes. The differences are significant, and "[t]he inference seems reasonable . . . that Congress by the words it chose marked a distinction which we should not obliterate. . . ." *Board of Governors* v. *Agnew*, 329 U.S. 441, 448 (1947).

These differences in statutory definitions undercut FCM's reliance on two Commission advisory opinions. *See* FCM Br. 19-20. Since both involved the FECA, rather than the Fund Act, they applied a broader definition of "political committee." Those opinions are therefore immaterial to a determination of what constitutes a "political committee" within the meaning of the Fund Act.

[10] *See, e.g.*, the remarks of Senator Pastore, the sponsor of the Fund Act, at 117 Cong. Rec. 42397-98 (1971) (speaking against amendment that, if adopted, would have extended Section 9012(f) to all types of committees). *See also id.* at 42626 (Fund Act would permit a group of people to pool their money, hire a hall and hold a rally).

will of Congress, so as to comport with constitutional limitations." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974), *quoting Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 571 (1973). This task can be successfully performed here. Indeed, Section 9012(f), properly construed, comports exactly with the constitutional distinction between contributions and expenditures that this Court drew in *Buckley*. *See* J.S. 24-25.

Appellees are therefore wrong in alleging that appellants seek to relitigate *Buckley*. We seek, rather, to construe Section 9012(f) "so as to comport with the constitutional limitations" announced in *Buckley*. To be sure, that task may involve difficult questions of constitutional and statutory analysis. But that is precisely why these cases should be decided only after plenary briefing and argument.

III. THIS COURT SHOULD REJECT THE ERRONEOUS JURISDICTIONAL AND STANDING ARGUMENTS ADVANCED BY AFC, OR IN THE ALTERNATIVE SHOULD ALLOW THE DISTRICT COURT TO PASS UPON THEM IN THE FIRST INSTANCE ON REMAND.

AEP and FCM apparently agree that appellants' appeal (No. 80-847) is within the jurisdiction conferred by the judicial review provision of the Fund Act, 26 U.S.C. § 9011(b), and is properly before this Court.[11] AFC, however, has moved this Court to dismiss the appeal on jurisdictional and standing grounds. AFC Br. 11-17. The Court should deny AFC's motion.

A. This Court Should Reject AFC's Jurisdictional Argument.

There is no merit to AFC's argument that 26 U.S.C. § 9011(b) does not authorize Count I of appellants' action—the only part of that action involved in this appeal.

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[11] Neither AEP nor FCM contends that appellants' may not properly prosecute this appeal. Nor has the Commission moved to dismiss the appeal.

See J.S. 10 n.15. Count I alleges that Section 9012(f) of the Fund Act applies to appellees' activities and requests appropriate declaratory and injunctive relief. Thus, Count I is authorized by the plain language of 26 U.S.C. § 9011(b), which states that "individuals eligible to vote for President are authorized to institute such actions, including actions for declaratory judgment or injunctive relief, as may be appropriate to implement or construe any provisions of" the Fund Act.[12] Congress has never expressly repealed this provision, and AFC does not contend otherwise.

AFC's argument is, at bottom, that Congress worked an implied repeal of Section 9011(b)'s express authorization to institute actions to "implement or construe" the Fund Act when, in 1976, Congress amended the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§ 431 *et seq.*, to give the Commission exclusive "enforcement" jurisdiction. *See* 2 U.S.C. § 437c(b)(1). But it is a "cardinal rule" of statutory construction that such implied repeals are disfavored. *Morton* v. *Mancari*, 417 U.S. 535, 549 (1974), *quoting Posadas* v. *National City Bank*, 296 U.S. 497, 503 (1936). An implied repeal may be found only when there is an "affirmative showing of an intention to repeal" or when "the earlier and later statutes are irreconcilable"—that is, when they are not "capable of co-existence." *Morton* v. *Mancari*, 417 U.S. at 550, 551. AFC's argument fails under this test, because (1) there is no "affirmative showing of an intention" to repeal Section 9011(b) either in whole or in

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[12] It is undisputed that appellants David Cohen and Winifred Long are "individuals eligible to vote for President" within the meaning of 26 U.S.C. § 9011(b). App. 73a-74a. It is also undisputed that appellant Common Cause has members who are "eligible to vote for President" and whose interests it represents in election-law matters, including litigation. App. 72a-73a. *Cf. Buckley* v. *Valeo*, 424 U.S. at 9 n.5.

part,[13] and (2) the private right of action expressly authorized by Section 9011(b) of the Fund Act is entirely "capable of co-existence" with Section 437c(b)(1) of the FECA.[14]

AFC's argument rests, moreover, on an erroneous premise. According to AFC, Count I of appellants' action is an "enforcement" matter within the meaning of Section 437c(b)(1) of the FECA, rather than an action to "implement or construe" the Fund Act within the meaning of Section 9011(b) of that Act. *See* AFC Br. 12. But

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[13] The legislative history relating to 2 U.S.C. § 437c(b)(1) contains no evidence whatsoever—let alone an "affirmative showing"—of any intention by Congress to repeal the authorization expressly granted by Section 9011(b). Indeed, the legislative history does not even mention Section 9011(b). This fact is dispositive on the question of an "intention to repeal," because the 1976 legislation did, expressly and specifically, amend other Fund Act provisions. *See* Pub. L. No. 94-283, Tit. III, 90 Stat. 497-502. With Congress explicitly specifying how it wished to change those provisions, it makes no sense to assume that Congress would have decided to repeal all or part of Section 9011(b) *sub silentio*.

[14] Section 9011(b) is entirely compatible with the provision of the FECA that deals with the exclusivity of remedies. 2 U.S.C. § 437d(e). That provision, which AFC has chosen to ignore, makes actions by the Commission "the exclusive civil remedy for the enforcement of the provisions of this Act"—*i.e.*, of the FECA. *See* 2 U.S.C. § 431(19). Because Section 9011(b) provides a remedy for resolving issues that arise under the Fund Act only, and not under the FECA, it is clearly "capable of co-existence" with Section 437d(e).

Section 437c(b)(1), in turn, is "capable of co-existence" with both Section 9011(b) and Section 437d(e). Section 437c(b)(1) does not deal with the exclusivity of any remedy; it deals, rather, with the scope of the Commission's enforcement jurisdiction. The purpose of Section 437c(b)(1) was to "simplify and rationalize" the civil enforcement powers that had previously been divided between the Commission and the Department of Justice. H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 3 (1976). Thus, Section 437c(b)(1) and Section 9011(b) are fully reconcilable.

Count I of appellants' action is virtually identical to the Commission's action. *See* J.S. 8-9. The Commission, however, does not regard its action as an "enforcement" matter; for instead of proceeding administratively, *see* 2 U.S.C. § 437g(a)(2),[15] the Commission brought an action under Section 9011(b) to "implement or construe" the Fund Act. *See* FEC J.S. 1. Since the Commission's action is an action to "implement or construe" authorized by Section 9011(b)—and no party contends otherwise—appellants' Count I, which involves the identical claim, is also an action to "implement or construe" authorized by that Section.

Equally unmeritorious is AFC's suggestion that the only actions which voters may bring under 26 U.S.C. § 9011(b) are actions against the Commission to challenge the constitutionality of provisions of the Fund Act. *See* AFC Br. 15. To limit actions under Section 9011(b) to suits seeking to overturn Fund Act provisions as unconstitutional would read the word "implement" out of the statute. Indeed, such a limitation would be contrary to the obvious intent of Congress, for it would allow only suits whose purpose was to *prevent* the implementation of the statute as enacted. Such a limitation would also be inconsistent with the Commission's prosecution of its own action under Section 9011(b)—an action, to which AFC has raised no jurisdictional objection, that seeks to give effect to, rather than to overturn, Section 9012(f) of the Fund Act.

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[15] As AFC acknowledges, "enforcement" matters are governed by 2 U.S.C. § 437g, which prescribes administrative procedures to be used in such cases. *See* AFC Br. at 12 n.17. Those procedures apply not only to "enforcement" matters initiated by private parties, 2 U.S.C. § 437g(a)(1), but also to "enforcement" matters initiated by the Commission, *id.* § 437g(a)(2).

B. This Court Should Reject AFC's Standing Argument.

AFC's argument that appellants lack standing also fails to withstand scrutiny. That argument ignores the crucial fact that Congress, in enacting 26 U.S.C. § 9011(b), determined that "individuals eligible to vote for President" have a sufficient stake in the statutory scheme for the public financing of Presidential elections to justify authorizing such persons to institute actions designed to ensure the proper functioning of that scheme.[16]

The cases that AFC cites do not advance its standing argument. *See* AFC Br. 16-17. Those cases, without exception, involved questions of standing that arose in the absence of an express statutory grant of authorization such as that contained in Section 9011(b). Here, Congress has created a statutory scheme, has determined that certain groups of persons have interests that are affected by it, and has expressly authorized those persons to institute actions to protect their interests. In such situations, Congress' determination is decisive on the question of standing.[17] As this Court stated in *Sierra Club* v. *Morton*, 405 U.S. 727, 732 n.3 (1972), "where a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue' . . . is one within the power of Congress to determine" (citation omitted).

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[16] Congress' determination was eminently reasonable; it is, after all, the voters whose interests the Fund Act is ultimately designed to safeguard.

[17] *See, e.g., Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973); *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 212 (1972) (concurring opinion of Justices White, Blackmun and Powell); *Animal Welfare Institute* v. *Kreps*, 561 F.2d 1002, 1005-06 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 511 F.2d 809, 814 n.26 (D.C. Cir. 1975).

C. In the Alternative, This Court Should Withhold Its Decision on the Jurisdictional and Standing Issues Until After the District Court Has First Passed Upon Them on Remand.

The district court has not yet passed upon the jurisdictional and standing issues raised by AFC.[18] Accordingly, if this Court does not now deny AFC's motion to dismiss, it should withhold decision on the jurisdictional and standing issues until after the district court, on remand, has ruled on them in the first instance.[19] This course is particularly appropriate, since these cases should in any event be remanded to the district court for factual development. *See* J.S. 13-16 and pp. 1-6 *supra*. This procedure would promote judicial economy, and would also ensure that these issues, when they finally come before this Court, will be framed in the manner best suited for disposition by it.

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[18] The district court considered jurisdiction only with regard to Count II of appellants' action, and—as AFC correctly acknowledges—only Count I is before this Court. AFC Br. 4 n.6. AFC thus also concedes, as it must, that the district court did not resolve either the issue whether 26 U.S.C. § 9011(b) authorizes appellants to prosecute the claim stated in Count I, *see* AFC Br. 11 n.15, or the issue whether appellants have standing to prosecute that claim, *see id.* at 16 n.23.

[19] *See, e.g., Youakim* v. *Miller*, 425 U.S. 231, 236 (1976) ("claim should be aired first in the [three-judge] District Court"); *United States* v. *Mississippi Tax Commission*, 412 U.S. 363, 379, 381 (1973) (same).

CONCLUSION

For the reasons set forth in appellants' Jurisdictional Statement and in this Opposition, the Court should deny appellees' motions to dismiss or affirm and should reverse (or vacate) the decision below and remand these cases to the district court. In the alternative, the Court should note probable jurisdiction of these appeals and set them down for a full hearing.

Respectfully submitted,

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